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No. 948.

Petition for Rehearing.

Filed May 13, 1901.

In the

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

FREEPORT WATER COMPANY,
Plaintiff in Error,
vs.
CITY OF FREEPORT,
Defendant in Error.

Cir. No. 7,858.
Term No. 948.

PETITION FOR REHEARING.

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29203

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

FREEPORT WATER COMPANY, *Plaintiff in Error,*	Gen. No. 7,833,
vs.	Term No. 348.
CITY OF FREEPORT, *Defendant in Error.*	

PETITION FOR REHEARING.

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the plaintiff in error in the above entitled cause, respectfully prays that a rehearing may be granted by this Honorable Court of said cause, in which a decision was rendered at the present term of this court, and, in support thereof, states the following grounds:

1. The case at bar was decided by the court under a misapprehension of the status of the case.

2. In its decision the court has not followed, but has departed from, well-established rules and decisions of this court, as to following the decisions of the state courts.

3. In construing the statutes of 1872, the court was under a wrong impression as to the status of the statutes

relating to water works, and the object sought to be accomplished, there being two separate acts, and has not given such statutes proper construction.

4. In the decision rendered on the question of the public policy of the State of Illinois, the court has given undue weight to certain decisions of the Illinois Supreme Court.

5. In construing the contract, this court has given to section 9 of the Illinois corporation act undue weight, when such section has no connection with, and does not relate to, the contract in question.

6. The court has overlooked the contention made by plaintiff in error, that the act of 1891 relates simply to contracts *in futuro*.

7. The court has gone further in its decision than the facts justify.

And your petitioner respectfully asks for an attentive consideration of the paper annexed hereto, in which an attempt is made to more fully state and support the grounds above mentioned, with such brevity, however, as the nature of the petition and the rule of the court requires, and your petitioner further moves that a rehearing of said cause may be had, pursuant to the rules and practice of this Honorable Court.

And, as in duty bound, your petitioner will ever pray, etc.

GEORGE C. FRY and
JAMES W. HYDE,
Attorneys for Plaintiff in Error.

We certify that, in our opinion, the foregoing petition for rehearing is well founded.

George C. Fry.
James W. Hyde
Of Counsel for Plaintiff in Error.

GROUNDS UPON WHICH THE REHEARING IS ASKED, TOGETHER WITH THE REASONS IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

It is with great reluctance that we come before this Honorable Court, already overburdened with labor, and present this petition. But the extreme importance of the decision announced, which has had the effect of overturning vast property rights entered into with the knowledge of and at the instance of the the legislature of the state, and unquestioned by any legislative act or authoritative decision for a period of twenty years, as well as by reason of the closeness of the decision, not only in this court but also in the Supreme Court of the State of Illinois, and, after a careful examination of the opinion, believing that this Honorable Court has not properly construed the acts of the legislature in question, and the contract entered into thereunder, we beg leave to present for their consideration the following:

I.

First. The case at bar was decided by this court under a misapprehension of the status of the case.

The court, in its opinion, says:

"The Supreme Court of the state based its decision on its opinions in the case of *City of Danville* v. *Danville Water Co.* (178 Ill., 299; 180 Ill., 255). In that case, the same statutes were involved as in the case at bar, and the contract which was claimed was based upon a substantially similar ordinance as that involved in the pending controversy."

Acting upon the principle that this court should "endeavor to avoid * * * any unseemly conflict with well-considered decisions of the state court," and, for the sake of harmony, "to incline to agreement with the state court," the decision of the court below was affirmed.

An examination of the opinion rendered shows that the decision of this court is based solely upon the reasons given by the Illinois Supreme Court in the Danville case, and not upon an interpretation of the contract placed upon it by the separate "independent judgment," of this court.

In rendering this opinion, the court has overlooked well-established principles decided in numerous of their own cases as to the extent this court will follow decisions of the state court.

The principle which underlies the reason for following the decisions of the State Supreme Court has never been extended by this court to the *specific* decision which is rendered by a state court *for the first time* and which decision is brought for its consideration, and is *then* under review by this court.

And herein lies the error upon which the decision in the case at bar was based, in that, although the Illinois Supreme Court had, in the Danville case (the same case going to the Supreme Court upon three separate appeals, 178 Ill., 299; 180 Ill., 235, and 186 Ill., 326), found against the contentions as now made by the plaintiff in error, yet this court has overlooked the fact that the *final* decision of the Illinois Supreme Court in the Danville case, which is now here for review, was submitted to, and considered by this court, *at the same time as and with the case at bar.*

This court holds, because of the reasons announced by the Supreme Court of Illinois, in its decision of the Danville case, the rights of plaintiff in error are foreclosed in this court, and when that same Danville case is brought here for review from the Supreme Court of Illinois this court further holds that the plaintiff in error in that case is foreclosed in this court "upon the authority" of the Freeport Water Company case here.

This court holds:

(1) That the Freeport case is determined by reason of decision of the State Supreme Court in the Danville case.

(2) That the Danville case is here determined by reason of the decision of this court in the Freeport case; therefore,

(3) The decision of the Danville case in this court is determined by the decision rendered in the Supreme Court of the State of Illinois in that same case.

This is the logical conclusion of the reasons given by the court for the affirmance of the case at bar, as well as the Rogers Park and Danville cases.

This argument is "reasoning in a circle."

The court are unmindful of the fact that the final decision in the Danville case should first be determined by the independent judgment of this court before they can say whether or not the principles announced by the Supreme Court in that case are to foreclose the rights of plaintiff in error in the case at bar. There was no separate, independent consideration by this court, either of the case at bar or in the Danville case, of the contract claimed to be impaired.

The final decisions, both in the case at bar and in the Danville case, were decided by the Illinois Supreme Court

at the same term, and opinions filed in each case on the same day (June 21, 1900). Writs of error were sued out from this court in each case, and made returnable to the same term, and by order of this court the cases were heard and submitted at the same time.

The decisions in the Danville cases reported in the 178 and 180 Illinois arose upon the pleadings. Those (Danville) cases were reversed *and remanded to the lower court for further proceedings in conformity with the opinions rendered.* It was not until the filing of the opinion by the Supreme Court of Illinois in the Danville case on June 21, 1900, that there was a *final judgment* therein from which a writ of error to this court could be prosecuted. Indeed in that case the Illinois Supreme Court say:

"Manifestly the only purpose of this appeal is to obtain a *final judgment* in this court *to enable appellant to take further appeal* if it should desire to do so."

The proceedings, as shown in the three reported decisions, were a continuance of but one case. It is the *final judgment* in that case that is now here on review. Until the entry of a *final* judgment in the state court the proceedings therein were still *in limine*, and, therefore, it cannot be said that a *binding* decision was entered therein, or that a course of decisions had been rendered in the state court, which had ripened into a rule of property, or from which the public policy of the state could be determined.

II.

Second. In its decision in the case at bar the court has not followed, but has departed from, well-established rules and decisions of this court as to following the decisions of the state courts.

The rule of this court, as to following state decisions, is, as stated by Chief Justice Marshall in *Polk* v. *Wendal*, 9 Cranch, 87, that "this court adopts the construction of the state where that construction is settled and can be ascertained," and this rule has never been departed from. With that rule we are content.

But this court has never applied this rule to a decision of the State Supreme Court establishing a construction for the first time, and which specific decision is here under consideration and for review.

This rule applies only to those cases where state courts have rendered a course of decisions which have become a rule of property or a settled policy of the law.

It is stated in *Detroit* v. *Osborne*, 135 U. S., 492, that the decisions of the state court are not binding unless the state courts have construed "some law of a local character which may have become established by those courts, or has always been a part of the law of the state."

In *Sioux City R. R* v. *N. A. Trust Co.*, 173 U. S., 107, it is said this rule applies only when there is "a *binding* construction of such state statute by the courts of last resort in the state."

Mr. Justice Matthews says, in *Louisville, &c., R. R.* v. *Palmes*, 109 U. S., 244, it is only where such decisions have been "*so firmly established as to constitute*

a rule of property (that) such has been the uniform and well-settled doctrine of this court."

Bank v. *Knoop*, 16 How., 369.
Gage v. *Pumpelly*, 115 U. S., 454.

In other words, it may be said that this rule is applicable only where the state courts have built up a *course* of decisions upon the strength of which parties have entered into a contract, or where there is a construction of local statutes which do not raise any *Federal* question.

Swift v. *Tyson*, 16 Peters, 1.
Fairfield v. *Gallatin Co.*, 100 U. S., 47.
Gormley v. *Clark*, 134 U. S., 338.
Lowndes v. *Huntington*, 153 U. S., 19.
Fallbrook Irrigation Dist. v. *Bradley*, 164 U. S., 154.
Castillo v. *McConnico*, 168 U. S., 674.
Nobles v. *Georgia*, 168 U. S., 405.
Sioux City R. R. v. *N. A. Trust Co.*, 173 U. S., 99.
I. C. R. R. v. *Chicago*, 176 U. S., 659.

This court has repeatedly held that decisions of state courts made *after the execution* of a contract are not binding on, and do not control, this court.

In *Knox County* v. *Ninth National Bank*, 147 U. S., 99, in construing the statutes of the State of Missouri authorizing the execution of bonds as to the effect upon the issue of said bonds, it is said "these decisions were made *after* the issue of the bonds, *and cannot be deemed* controlling. *Cass Co.* v. *Johnson*, 95 U. S., 360; *Davies County* v. *Huidekoper*, 98 U. S., 98; *Douglas* v. *Pike*, 101 U. S., 677; *Carroll Co.* v. *Smith*, 111 U. S., 556."

To the same effect also are the cases of

Bridge Proprietors v. *Hoboken L. & I. Co.*, 1 Wall., 116.

Mitchell v. *City of Burlington*, 4 Wall., 270.

Delmas v. *Insurance Co.*, 14 Wall., 661.

Johnson v. *Waters*, 111 U. S., 640.

Anderson v. *Township of Santa Anna*, 116 U. S., 356.

The rule that this court follows state decisions does not apply to state decisions construing legislation enacted subsequent to the making of a contract or the vesting of a right or obligation.

Anderson v. *Town of Santa Anna*, 116 U. S., 356.

Turner v. *Wilkes County Com'rs*, 173 U. S., 461.

Nor does this rule apply to a case where there is a Federal question.

Walker v. *Marks*, 17 Wall., 648.

Costello v. *McConnico*, 168 U. S., 675.

Remington Paper Co. v. *Watson*, 173 U. S., 443.

Where there is a Federal question, it is the duty of this court *to determine for itself*, independent of the state court, whether or no there is a contract, and what that contract means.

Anderson v. *Town of Santa Anna*, 116 U. S., 356.

Stearns v. *Minnesota*, 179 U. S , 225.

(And other cases cited, Arg., 37.)

The rule as contended for by us is recognized in the case of *Burgess* v. *Seligman* (cited by the court), where the court say:

"The courts of the United States * * * endeavor to avoid, and, in most cases do avoid, any unseemly conflict with *the well-considered decisions* of the state courts."

Yet, in that case this court refused to follow the decision of the state court of Missouri construing the effect of the statute in the question before them for consideration, but held directly contrary to such decision, and affirmed the contrary construction placed upon the statute by the Circuit Court.

In the case of *Stearns* v. *Minnesota* (179 U. S., 225), which is one of the latest printed utterances of this court, they had no hesitancy in overruling the decision of the Minnesota Supreme Court then under consideration, because contrary to their own construction, and the court there say:

"The general rule of this court is to accept the construction of a state constitution placed by the State Supreme Court as conclusive. One exception which has been constantly recognized is when the question of contract is presented. This court has always held that the competency of a state through its legislation to make an alleged contract, and the meaning and validity of such contract, were matters which in discharging its duty under the Federal constitution *it must determine for itself;* and *while the leaning is towards the interpretation placed by the state court, such leaning cannot relieve us from the duty of an independent judgment upon the question of contract or no contract.*"

Indeed, in *Burgess* v. *Seligman* the court (Mr. Justice Bradley) says:

"It is not only the duty of the court to exercise its own judgment, 'but it would be *a dereliction of their duty*

not to exercise an independent judgment in cases not foreclosed by previous adjudications.'"

It is not claimed that there had been any previous line of decisions in the Illinois Supreme Court prior to that rendered in the Danville case.

The act authorizing the execution of contracts by a municipality for the supply of water was passed in 1872.

The ordinance of the City of Freeport was passed and accepted by Shelton in 1882.

The amendatory act of the legislature was passed in 1891.

The Danville case, which was submitted to the consideration of this court at this term, with the case at bar, was not a *binding* decision, until a final determination thereof in this court.

Therefore, when entering into the contract of 1882, Shelton "and assigns" were not foreclosed by any decision of the Illinois Supreme Court as in the case of *Wade* v. *Travis Co.*, 174 U. S., 509 (and in numerous other similar cases decided in this court).

This court, if consistent with the doctrine announced in repeated previous decisions, must construe this contract of June 7, 1882, as an *independent* question, not forestalled or foreclosed by any rule announced in any decision now here under review.

Even if the construction of the contract in question be "balanced in doubt" and there be an inclination to follow the opinion of the state court, such fact does not relieve the court from an independent examination of the question which comes up not as a review of a "course of decisions" of the state court, but as a separate and distinct decision of a State Supreme Court, the right or

wrong of which decision is here under consideration. This consideration we respectfully submit the case has not received.

III.

Third. In construing the acts of 1872, the court was under a wrong impression as to the status of the statutes relating to water works, and the object sought to be accomplished, there being two separate acts, and has not given such statutes proper construction.

Although the Danville case was argued and decided below mainly upon the reserve police power, the decision was not rendered in this case because of such reserve police power.

The doctrine of *Munn* v. *People* is, therefore, not applicable to the case at bar. That such doctrine was not applicable to such cases was so held in *Pearsall* v. *Chicago Great Northern* (161 U. S., 647) and in *Walla Walla* v. *Walla Walla Water Co.* (172 U. S., 9), and the court does not say that the doctrines of those cases are not applicable.

What the court does hold is that there is an ambiguity in the words of the statute of April 10, 1872. This court here (as elsewhere in their opinion, adopting *totiem verbem* the language of the Supreme Court of Illinois in the Danville case), incorporates in the body of the statute the words "*time to time*," so as to make it read "at such rates as may *from time to time* be fixed by ordinance."

Prior to 1872 there were in existence in the State of Illinois but seven systems of water works supplying

municipalities with water, and these were owned and managed by the municipalities.*

As the country developed, and villages and cities grew, the demand for pure water for hygienic, as well as convenient purposes, increased.

The expenditure necessary for these improvements was large. Municipalities in the State of Illinois were limited by the constitution of 1870 as to the amount of the indebtedness which could be incurred for all purposes. (Sec. 12, Art. 9, Constitution 1870; Vol. 1, Starr & Curtiss' Stats., p. 182.) Little or no money could be raised by cities or villages for such purposes without exceeding the constitutional limit of indebtedness. The only way such water systems could then be built was by private capital.

The fact that individuals would not invest capital in water plants, except under a contract for a fairly long term of years, was universally known. The language of Mr. Justice Davis, in Binghamton Bridge Co., 3 Wall., 51 (decided in 1865), is most apt:

"The legislature, therefore, says to the public-spirited citizens, 'if you will embark with your time, money and skill in an enterprise which will accommodate the public necessities, we will grant you, for a limited period, or in perpetuity, privileges that will justify the expenditure of money and the employment of your time and skill.'"

This fact was fully recognized in *East St. Louis* v. *East St. Louis Gas L. & C. Co.*, 98 Ill., at page 426, where it was said it was because of the "difficulty of securing a contract for the construction of such expensive works as are here involved [could not be overcome] without the assurance of patronage for some considerable

* "The Manual of American Water Works, 1897," by M. N. Baker, Copyrighted 1897 (4th issue), page 361 *et seq.*

length of time; and in [by] the mention in the company's charter of *thirty* years as the time for the exclusive supply of the city with gas light."

The situation is clearly stated in the case of *The Illinois Trust & Savings Bank* v. *City of Arkansas City*, 40 U. S. App., 257:

"It is hardly possible that any individual or corporation could have been induced to expend the thousands of dollars required to construct such works as have been built in this city in consideration of the right to use the streets of the city for that purpose, and of the terms of rental for its hydrants for the limited term of a single year."

The same difficulty is also recognized in *Fergus Falls Water Co.* v. *City of Fergus Falls*, 65 Fed. Rep., 591; *Little Falls Electric & Water Co.* v. *City of Little Falls*, 102 Fed. Rep., 663; *Blood* v. *Manchester Electric Light Co.*, 68 N. H., 340; *Maine Water Co.* v. *City of Waterville*, 93 Me., 586; and in numerous other cases cited and quoted from by us in our argument.

The court say, in *Arkansas City* case: "*These facts the members of the legislature must have known, and they undoubtedly granted this plenary power to construct for the very purpose of enabling the cities to procure a supply of water for their inhabitants*" for the full period of the authorized term "with covenants to pay rental for the like term."

Not only must the members of the legislature have known this fact, but for a continuous period of nearly twenty years, and until July 1, 1891, the legislature of the State of Illinois not only permitted but *invited* individuals, including plaintiff in error, to invest their money in water works upon the faith of the promise contained

29216

in the statute of the right to fix the rates for thirty years.

Upon the passage of the acts of 1872, and prior to July, 1891, there were instituted by private parties (individuals, companies or corporations) thirty-six different systems of water works, in more than that number of cities, at a cost of more than $5,000,000.*

The legislature had, prior to 1872, granted special charters to a limited number of corporations, giving them power to construct and maintain water works for long terms of years, but no *specific* authority was given such corporations to make long *time* contracts with a municipal corporation. Cities and villages were then governed

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*The Manual of American Water Works.

City.	Cost.	City.	Cost.
Alton	$ 200,000 00	Joliet	$ 275,000 00
Belleville	175,000 00	Kankakee	160,000 00
Cairo	100,000 00	Kenilworth	30,000 00
Carlinville	50,000 00	La Grange	180,000 00
Carlyle	35,000 00	Lake Forest,	75,000 00
Cambridge and Urbana	100,000 00	Lewiston	32,000 00
		Lincoln	300,000 00
		Lockport	5,000 00
Chebanse	3,500 0	Mattoon	100,000 00
Pullman	180,000 00	Metropolis	38,000 00
Rogers Park.	70,000 00	Moline	50,000 00
Danville	250,000 00	Murphysboro	75,000 00
Dixon	140,000 00	Oak Park	150,000 00
East St. Louis	(not given)	Pekin	100,000 00
Elmhurst	35,000 00	Quincy	475,000 00
Freeport	307,425 00	Shelbyville	100,000 00
Galena	75,000 00	Sterling and Rock Falls	150,000 00
Galesburg	(not given)		
Spava	12,500 00	Streator	275,000 00
	$1,733,425 00		$2,470,000 00

by special (as was defendant in error, Arg., 43) or general charters, which were not uniform in their powers, but which generally authorized municipalities "to provide the city with water." The constitution of 1870 of the State of Illinois required all laws thereafter passed to be uniform and of a general nature. The legislature thereupon commenced to revise the laws of the state. This revision resulted in the Revised Statutes of 1874.

Incorporated in these revisions are the acts of April 9th and 10th, 1872, and the revised act relating to cities and villages, which act was also passed on April 10, 1872.

The different powers and provisions of the special and general charters of cities and villages theretofore granted while acting thereunder could not be made uniform with the provisions of the revised city and village act of 1872. All the legislature attempted to do was to make them as nearly uniform as might be.

It is true that the statutes of 1872 are to be construed in *pari materia*, but it is also true that they are *to be construed in reference to the particular objects which they each severally were intended to accomplish.*

It was held in the year 1878 in the case of *The Chicago Packing & Provision Company* v. *City of Chicago*, 88 Ill., 223, where the Revised Statutes of 1872, relating to cities and villages, was under consideration, that:

"This act was not adopted for the City of Chicago, but for all cities and villages of the state that *might organize* under *or adopt* it as the fundamental law of their organization, and the sole source of their power. The General Assembly did not, nor could it, know that the City of Chicago would ever adopt the act as its charter. * * * The act being adopted, not for Chicago, but for all the cities adopting it, *we should, in construing it, not look to*

the special charters of the small municipalities having one thousand inhabitants and upward, *to give a construction to the general law.*"

It was further held in that case that the revised city and village act was *not an amendment* of the charter under which the city was then acting, and that this law "*must be regarded and construed as an independent act, without reference to, or as an amendment of*, all the special city and village charters of the state."

With the knowledge of and after the rendition of the decision in the *Chicago Packing and Provision Co.* case the legislature, in 1885, further modified the act of April 9, 1872, by inserting therein the words "any person or" so as to read, "Where water works may hereafter be constructed *by any person* or incorporated company."

Whether any or what cities might reorganize under the revised city and village act of 1872, the legislature of course could not tell. But the legislature, by their acts, a second time recognize our construction of these two statutes, that they apply to two separate classes of cities and villages when they endeaver to bring all cities and villages within *common* provisions as to powers to establish water works, when in 1891 they pass one of the acts under review when providing "that the corporate authorities of the city, town or village, *now or hereafter* incorporated under any *general or special* law of this state," etc.

That the two acts of 1872 are intended to apply to two *separate* classes of cities and villages is shown by the titles of the acts. The title of the act of April 9th is "An Act to enable cities and villages to contract for a supply of water for public use." (Arg., 34.) The title

of the act of April 10th is identically the same as the revised city and village act passed the same day, namely, "An Act to provide for the incorporation of cities and villages." (Arg., 34; 1 Starr & Curtis' Stat., p. 675, Pub. L. 1871, p. 259, as part of the city and village act.) The one act relates to cities then organized, and the other act to those cities which might thereafter be organized under the revised city and village act.

With this knowledge of the reason of the passage of two acts at the same session of the legislature apparently not in harmony, and, in reality, applying to two separate and distinct classes of cities and villages, viz.: (1) Those organized under previous special or general charters which might not avail themselves of the provisions of the act of 1872 relating to cities and villages; and (2) those cities and villages which should accept the provisions of that act, all apparent conflict in the provisions disappear. The acts are consistent with each other, and, in the light of these facts, and the situation at the time of their passage, there is no ambiguity as to the meaning of or in the construction of those acts, and no necessity of applying the doctrine *redenda singula singulæ*, as this court has done.

The act of April 9th applied only to municipalities then *in esse*. It did not apply to cities and villages which might thereafter be organized under the provisions of the Revised City and Village Act of 1872 (to which laws the act of April 10th was applicable). The act of April 9, 1872, shows that it was the intention of the legislature to authorize municipalities organized under charters then in force to provide (contract) for a supply of water in such manner as to them should seem best, for a period not exceeding thirty years. This court construes the act

of April 10, 1872 (which was intended to apply to one class of cities and villages), by the absence of some wording in another statute (intended to apply to another class of cities and villages).

The case of *Chicago Packing & Provision Co.* v. *People*, *supra*, holds that the act of April 9, 1872, is to be construed as an independent act, without reference to the charters of cities and villages organized under another act. Therefore there can be no aid "deduced" in construing the act of April 10, 1872, by reason "of silence in the statute of April 9, 1872."

If the two acts of April 9th and 10th are to be construed in *pari materia*, the same limitations must be applied to each of these acts. This, then, would make the act of April 9, 1872, read:

"The city and village authorities in such cities may (by ordinance from time to time) contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years."

There is no principle under which such words can be interpolated in the act of April 9, 1872. Courts do not make contracts for parties, be they municipal or individuals. Courts construe contracts as the parties make them. The language of the act of April 9, 1872, was plain, ample and absolute in its terms, with no restrictions, and capable of construction as contended for by us, and under such plain provisions of the statute many of the water companies in this state (including plaintiff in error) were afterwards organized, construing the statute as contended for by us.

The legislature of this state again in 1885 (after nearly one-half of the private water plants had been organized under the acts of 1872) re-enact in identically the same

language the statute of April 9, 1872, enlarging its terms to include individuals. Why did the legislature in 1885 a second time pass such act giving unrestricted and unlimited power to municipalities to "contract" for thirty years? It is admitted that the legislature had the power to pass such an act. There must have been some reason for leaving out the word "ordinance" in the act of April 9, 1872. That it was *intentional* and not an oversight, is shown in the fact that identically the same language is employed when re-enacting and enlarging the same act thirteen years afterwards in 1885. The only reason for leaving out the *interpolated* words in these two acts of April 9, 1872, and 1885, consistent with legal construction, is that the legislature intended such power to be untrammelled, unrestricted, save as to the length of the time for the making of the contract. There is no ambiguity in the wording or construction of this act. If a municipality could, under the provisions of the act of 1849 (or the special charter of Freeport, 1855) "provide the city with water for the convenience of the inhabitants" (Arg. 43), of what use are the words "for a period not exceeding thirty years"? Why specifically give the city power to make a contract when it already had such authority, and which authority necessarily implies the power to contract for *some* time. Unless the words "for a period not exceeding thirty years," in the act of April 9, 1872, shall be construed as of equal rank with the word "contract," then such words are useless, meaningless and *mere surplusage*, and do not give the municipality power to make any contract, which is the test of the words employed.

While the argument as to the act of April 9, 1872, does not determine the meaning of the language of the

act of April 10, 1872, still this court has deemed it necessary to support its construction of this act by relying upon the *absence* of the word "ordinance" from the act of April 9, 1872. The legislature, under the act of April 9, 1872, did not deem the word "ordinance" necessary to the execution of a contract. The power there given was not limited to an ordinance. It was not until 1891 that the legislature deemed an ordinance necessary. The court here limits the power given in the acts of 1872. Under what power can the court insert the word "ordinance from time to time" in the act of April 9, 1872, when the legislature did not deem such provision needed until nineteen years afterwards? The analogy ceases, and the apparent ambiguity disappears, when we understand the reason for the passage of the two acts.

The same reasoning which applies to the act of April 9, 1872, applies equally to the act of April 10, 1872. When the legislature gave power to municipalities to authorize the construction of water works, it gave the municipality authority to effectuate such power, in the only possible way, that is, by contract. Call the right acquired under this power a franchise, or what you will, it is too well settled in this court to require the citation of authorities to show that such right, when acted on, is a contract.

The court says, in its opinion in this case, "the clause 'for a period not exceeding thirty years' *qualifies* the words 'construct and maintain the same,' but does not *qualify* the words, 'at such rates as may be fixed by ordinance.'"

Undoubtedly the phrase, "as may be fixed by ordi-

nance," as well as the phrase, "and for a period not exceeding thirty years," each *relate* to the preceding words, "erect and maintain." The statement of the court that these phrases *qualify* such words is not correct grammatically.

The word "and" has not the quality of either an adjective or adverb, whose properties are to qualify or show degree. "And" is a copulative "conjunction that denotes addition."*

The word "and" does not qualify, *i. e.*, "modify, restrict, limit, restrain" (Webster), the words "erect and maintain."†

While this court recognizes rules of grammar, it has wholly disregarded the grammatical effect of the conjunction "and" in the clause "as may be fixed by ordinance, *and* for a period of thirty years."

Plaintiff in error has not claimed that the phrase "and for a period not exceeding thirty years" *does* qualify the clause "as may be fixed by ordinance." There was, and is, no claim that the conjunction "and" should

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*Brown's "Grammar of English Grammar" (10th Ed.), p. 430.
Fowler's "English Language in its Elements and Forms" (Ed. 1873), §375.
"The use of 'and' indicates that the new statement is superadded to, and distinct from, the previous."
Bardeen's Complete Rhetoric, CXIX.
And "is a particle which expresses the relation of addition."
2 Amer. & Eng. Ency. Law (2nd Ed.), 332, and cases cited.

†"Conjunctions *link together* words, phrases or sentences."
Brown's Grammar, p. 428, Obs. 2.
"Conjunctions have no *grammatical modifications*."
Brown's Grammar, p. 431, Obs. 7.
"Conjunctions themselves have no *government*."
Brown's Grammar, Rules XXII, Obs. 1.

be construed in other than its usual and customary sense.*

But plaintiff in error does claim that by giving force to, and construing the conjunction "and" grammatically, the phrase "*and* for a period not exceeding thirty years," as well as the phrase "as may be established by ordinance," are each of equal rank and order, co-ordinate with (and not subordinate to) the other. (Arg., p. 49.)

You cannot add to, or take from, either of these two phrases without rendering the other subordinate. The moment you attempt this you detract from the force, grammatical construction and meaning of the conjunction "and." This, under well-settled grammatical rules, cannot be done. If you construe either phrase as distributive you must so construe the other phrases. This would destroy all meaning of both phrases.

That words of a statute, as of a contract, should be construed according to grammatical rules, is not controverted.

That grammatical constructions extend to conjunctions is also admitted.

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*"Any two terms which are connected by a conjunction should be the same, or kind in quality, rather than different or heterogeneous."
Brown's Grammar, Rule XXII, p. 677, note 2.

"In general, only the same parts of speech should be united by conjunctions in the same construction."
Bardeen's Complete Rhetoric, CXIX.

"It is signified by the conjunction 'and' that the propositions *stand on the same basis* and both are to be asserted with the same degree of confidence."
Fowler's English Language in Its Elements and Forms, §376, p. 375 (1).

"When any words or terms are to be taken conjointly as subjects or antecedents, the conjunction 'and' *must* connect them."
Brown's Grammar, Rule XXI, p. 599, note 5.

Sentences and phrases "are connected in the way of co-ordination when they are not dependent one upon the other."
Fowler's English Language in Its Elements and Forms, p. 380.

See, also,

Insurance Co. v. *Dunne*, 19 Wall., 214.*
Accident Insurance Co. v. *Crandall*, 120 U. S., 527.†

The court, however, does not, in their decision, give to the conjunction "and" its recognized grammatical construction.

The court can give the conjunction "and" its true grammatical construction and meaning, and still construe it as relating to the words "construct and maintain." Such construction will not be conflicting or contradictory. The court should, in accordance with established rules of grammar, give the conjunction "and" its proper meaning, so as to make the clause "as may be fixed by ordinance" co-ordinate—of equal rank—with, and not secondary to, the succeeding clause "*and* for a period of not less than thirty years."

It is presumed the members of the legislature, when passing the act in question, were acquainted with well-established rules of grammar (as to which there is no conflict), and that they employed the language in the act of April 10, 1872, intelligently and intentionally.

Had the legislature intended that the words "from time to time" should be incorporated in either of the statutes of 1872, as this court by its decision now does, it would not have waited until 1891 before using these words. Their "absence" in the statute of 1872 and

*Where the court, construing the disjunction "or," hold the grammatical construction of the phrase "before final trial or hearing" to be "before final trial or *final* hearing."

†Where the court, again construing the same disjunction, hold the grammatical construction of the phrase "bodily infirmity of disease" to be "bodily infirmity or bodily disease."

their "presence" in the act of 1891 show that they understood their effect and gave a construction that cannot be gainsaid and is incontrovertible.

The uniform course of construction by the municipalities and legislative authorities, as well as the parties establishing water works under the acts of 1872, for the period of twenty years, should be entitled to great if not controlling consideration.

IV.

Fourth. In the decision rendered on the question of the public policy of the State of Illinois, the court has given undue weight to certain decisions of the Illinois Supreme Court.

There was no declared policy asserted by the state as evidenced in an act of the legislature restricting a municipality in making a contract for a supply of water unless it be contained w thin the very terms and provisions of the acts of 1872.

The policy as outlined by the acts of the legislature was shown in our argument (p. 43).

Nor was there any declaration as to such public policy as evidenced in any decision prior to that rendered in the Danville case now here under review.

While this court cite the cases of *Stevens* v. *School Directors*, 87 Ill., 255, and *Davis* v. *School Directors*, 92 Ill., 293, as tending to such public policy, they admit that they do not establish such public policy. These cases only announce a well-established rule of the power of municipal bodies under their *implied* power, and in

the *absence* of any legislation whatever upon the subject. This is not the case at bar.

This court in their opinion say:

"*In East St. Louis* v. *East St. Louis G. L. & C. Co.*, 98 Ill., 415, decided in May, 1881, the doctrine of those cases was not adopted as applicable to a contract for gas rates, nor was it rejected. One justice (*dissenting*) asserted it with great emphasis, quoting those cases. The court, however, left it disputable, placing the decision on other grounds. There was at least admonition in those cases to persons entering into contracts with municipalities."

Because the court in that case neither adopted nor rejected the doctrine in the Stevens and Davis cases, this court (by implication at least) seek to establish the public policy of the state. Had it been germain, necessary or proper to have decided that question in the East St. Louis case, or had the court in that case passed upon that question, then this court might deduce from such decision the public policy of this state. The principle decided in the Stevens and Davis cases was not involved, did not arise, and was not necessary to be decided in the East St. Louis G. L. & C. Co. case. This the court admits. Because it was not necessary to decide that question, the State Supreme Court refused to pass upon such question.

Upon the question that the contract was objectionable, "as unnecessarily tying up the hands of the city council" for the period of thirty years, the court, in the East St. Louis Gas L. & C. Co. case, say:

"Whether this length of time of the running of the contract be a valid objection to it, *we deem it unnecessary to determine*, for the purpose of this suit, *and would not be understood as expressing any opinion* in that regard; for, admitting that the contract cannot be upheld in this

respect, it is an objection, we conceive, which applies only to the executory part of the contract, and has no application to the executed part of it."

The court decided that such question was not germain or necessary to the proper decision of the case before it, and after so holding whatever it might have said in regard to that question, it is well established, would have been mere *obiter dicta*.

Carroll v. *Lessee of Carroll*, 16 How., 275.
Florida v. *Schutte*, 103 U. S., 143.

The court, in the East St. Louis Gas & Light Co. case, gave the following reasons for their decision:

"So far as the contract has been executed it has been as one for the furnishing of the light during the pleasure of the city. Had the contract been in that form it would not have been obnoxious to the objection made to it. Courts should not destroy the contracts made by parties further than some good reason requires. Such an objection as it made to this contract, that it interferes with the exercise of the legislative or governmental power of the city over the subject, does not require that the contract should be held void, but only voidable so far as it is executory. It is enough for the obviating of any such objection that there be the right at any time to avoid the contract so that there may be the freedom to exercise its governmental power in regard to the subject when and as the city pleases. So far as the contract has been performed by furnishing light to the city without its disaffirmance of the contract it may be treated as if it had been a single contract for the furnishing of the light for the months in question alone, and one fully completed. The gas light having been furnished and enjoyed by the city without objection, it should pay for it. There was no interference with the exercise of any legislative or governmental power upon the subject. As well after the erection of a hospital or work house, or other needful building, or gas works, for itself, under a contract for such erection or construction, had one been made, might the city refuse to

pay therefor, because the contract, during the time of its running, was an abridgement of the city's governmental power to provide otherwise in respect to the subject-matter, as to refuse to make payment in the present case for the gas light which has been furnished. We do not see why there would not be as much force in the objection which is here made in the one case as in the other.

"There can be no doubt that it was within the scope of the authority of the city to contract upon the subject. There is nothing of illegality in the contract such as requires that it should be held void in the whole, the part performed as well as that not performed; and what the city has received and enjoyed the benefit of, under the contract, there is no principle of law which will justify it in its refusal to pay for.

"The general rule applying in such case is thus stated in 2 Parsons on Contracts, 790: 'A general rule has been asserted which certainly rests upon reason and justice. It is that where a party has accepted and made his own the benefit of a contract he has estopped himself from denying in the courts the validity of the instrument by which those benefits came to him.'

* * * * *

"In *Hitchcock* v. *Galveston*, 96 U. S., 341, the city council of Galveston had contracted with Hitchcock and others for the construction of certain sidewalks, to be paid for by the issue of city bonds. After the work was partly performed, the city council stopped the work and prevented its completion. The action was for this breach of the contract. It was objected that by reason of the supposed want of power to issue the bonds, the entire contract was void, and no action could be maintained for the breach thereof. The Supreme Court of the United States held that the city was liable to the extent of the work actually performed under the contract, even though it had no lawful authority to issue the bonds, and in discussing the subject said: 'It is enough for them (plaintiffs) that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to

assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments can not be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful.' Citing as in support of the decision the case of *The State Board of Agriculture* v. *The Citizens' Street Railway Co.*, 47 Ind., 407, where it was held that 'although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract.' See *Daniels* v. *Tearney*, 102 U. S. Rep., 415.

* * * * *

"There is, at most, but a defect in power to make a contract running for so long a time, and we consider, in the circumstances of this case, that the doctrine above enunciated applies here with equal force *as in any case of a private corporation.*"

We have quoted so fully that the court may see that there was no intention or intimation to pass upon the question of public policy. All the court held in that case was that the city was liable on the contract made for the gas actually furnished to and used by the city under the contract as executed. So at bar; the water was furnished to, and used by, the city, under the contract made June 7, 1882.

Identically the same question was before the court in the Carlyle case (52 Ill. App., 577; Arg. 77). The Carlyle Company was organized in the year 1886, and fur-

nished the city water under an ordinance providing for water rates for a period of twenty-one years. The city refused to pay for the water. The water company sued and obtained a judgment for all the water furnished prior to the institution of the suit. The Appellate Court held in that case, as in the East St. Louis Gas Light and Coke Co. case, that it was not necessary to pass upon the question whether the ordinance was invalid, but affirmed the judgment against the city, on the authority of the East St. Louis G. L. & C. Co. case.

In neither case was it necessary to raise or decide the question of public policy, nor did the courts attempt to do so. In the East St. Louis G. L. & C. Co. case, the court expressly refused to pass upon the question, and the Appellate Court, in the Carlyle case, affirmed the judgment on the strength of the East St Louis G. L. &. C. Co. case.

No question of public policy of the state can be raised, much less established, from the decisions.

Moreover, no settled policy of the state can be established by the decision of an Appellate Court of the State of Illinois, because:

(1) There are five distinct Appellate Courts (four original and one branch court) in this state.

1 Starr & Curtis, Stat., Sec. 21, p. 1151.
Public Laws, 1897, p. 185.

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*One illustration will suffice:

O'Donnell v. *C. & A. R. R.*, 22 Ill. App., 237 (2nd Dist.), and *Aarvig* v. *Kellogg*, 21 Ill. App., 530 (2nd Dist.), hold one way on the proposition before them, and

Steele v. *Lovejoy*, 23 Ill. App., 575 (1st Dist.), and *American Ins. Co.* v. *Arbuckle*, 32 Ill. App., 371 (2d Dist.), hold *contra* on the same proposition.

As a practical proposition, where the same questions have been submitted to different Appellate Courts in this state, their decisions have frequently been in direct conflict,* and it was not until the rendition of a decision by the Supreme Court of the state upon such questions that a rule of property or public policy as to such questions could be held to have been laid down or established.

(2) By the act creating such courts, they are required to file written opinions in each case decided, but it is specifically declared that such opinion "*shall not be binding authority in any case or proceeding* other than that in which they may be filed." (1 Starr & Curtis' Stat., §37, p. 1155.)

This court, in *contravention of the provisions of the statute* of the State of Illinois, declares the public policy of the State of Illinois upon the strength of an opinion which is not binding on any court whatever, and disregards what must be conceded the established doctrine by great weight of, if not the almost unanimous line of decisions in the cases which have passed upon the authority of a municipality to make contracts to provide for water works upon long-time contracts. (Arg., pp. 45 to 72.)

(2) And here, in passing, we may notice the case of *Detroit Citizens Ry. Co.* v. *Detroit Ry. Co.*, 171 U. S., 40, which is cited by the court as determinative of the case at bar. That case is not at all analogous.

The case presented upon the record and pleadings, and upon which the court was called upon to pass, is not whether the contract executed is void because there was an *exclusive* license, as in *Detroit Citizens Ry. Co.* v. *Detroit Ry. Co.*, 171 U. S., 40, but whether or not plaintiff in error delivered to, and the defendant in error

received from, plaintiff in error and used and appropriated water furnished under a contract with the municipality executed under an act of the legislature authorizing a municipality to make a contract for such supply. Whether or not such contract is exclusive will not aid in the determination of the question before the court, and does not affect the questions at issue in this case, for if the provisions of the ordinance, so far as granting an exclusive right, is void it is well settled that the balance of the contract is valid.

That contracts such as the one at bar, although exclusive, may be made and be binding on a municipality, is admitted in the opinion.

So long as defendant in error receives water from plaintiff in error, then as to so much of the contract as is executed, defendant in error, under the authority of East St. Louis Gas Co. Case is liable to plaintiff in error for the price thereof.

V.

Fifth. In construing the contract, the court has given to section 9 of the Illinois corporation act undue weight, when in fact such section has no connection with, and does not relate to, the contract in question.

(*a*) Section 9 of the Illinois corporation act cannot apply and does not aid in the construction of the acts of 1872, 1885 or 1891.

It being conceded that the contract of June 7, 1882, was made between Shelton and the defendant in error, it must be further conceded that if Shelton, and not the Freeport Water Company, were here as plaintiff in error, section 9 of the corporation act would not be applicable.

This proposition ought, in itself, to be sufficient answer to the statement that the acts of 1872, 1885 and 1891 are to be construed by the aid of section 9 of the corporation act.

This court, however, after quoting from *Burgess* v. *Seligman* as to what rule should control the court in the construction of the contract in question, immediately proceed to discuss the provisions of this corporation act, and base their decision upon and adopt what the Illinois Supreme Court stated in the Danville case in reference thereto.

In addition to the reasons given by us that section 9 of the incorporation act is not applicable to the statutes of 1872, 1885 and 1891 (Arg., 93, 107), we show your Honors:

That the legislature did not intend that section 9 of the incorporation act should apply to the acts of 1872, 1885 and 1891, is proven conclusively by the fact that the acts of 1872, 1885 and 1891, by their terms, make the same applicable to "an incorporated company" (1872), and "person or private corporation" (1885), and "any individual, company or corporation" (1891). Why, if section 9 of the corporation act was intended to apply to these acts, should the legislature therein particularly specify not only individuals and companies, but also *corporations*, as coming within the provisions of those acts? The fact that corporations are specifically designated and included in these acts negatives the intention of the legislature to include them by reason of section 9 of the incorporation act. *Expressio unius exclusio alterius* is peculiarly applicable here.

If section 9 of the corporation act is not applicable to

Shelton, as it must be conceded it is not, and, therefore, not applicable to any other individual, under like circumstances and conditions, then this court, by the decision rendered herein, incorporates in (adds to) the contract made between Shelton and defendant in error, section 9 of the corporation act. In so doing, this court expressly holds that the legislature intended by the acts of 1872, 1885 and 1891 to authorize building and maintaining *two* separate systems under precisely similar circumstances, for the supply of water to a municipal corporation, *namely, one system* where water is supplied by individuals (or companies), and *another system* where water is supplied by incorporated companies. That there should be two such systems, one of which *should be* subject to the provisions of section 9 of the corporation act, and one which *should not be* subject thereto, surely could never have been the intention of the legislature.

Suppose Shelton had built and maintained the water system, say until 1887, and then transferred such system to plaintiff in error (a corporation), which had retransferred the same to Shelton in 1890 (or some other individual), and that Shelton (or such other individual) were the owner, and plaintiff in error, then, under this decision, there would be one rule of construction applicable to Shelton while he was the former owner and present owner, and another rule of construction applicable while the water company was owner, both being owners under similar circumstances. This court cannot be deemed to have held any such proposition, but this is the logic of its decision.

Suppose that, on July 1, 1872, a municipality (not organized under the revised statute of 1872 relating to cities and villages) had made a contract with a private

corporation (organized under a special charter prior to the adoption of the revised corporation act) for a supply of water for thirty years, can it be said that section 9 of the incorporation act would affect such a contract? Admittedly not.

The decision of this court would then make one rule of construction for corporations organized under general or special laws prior to 1872, and another for corporations organized after that act—both corporations, however, doing business under precisely similar circumstances. Then such act as to corporations would clearly be void.

This was so held in *Braceville* v. *People*, 147 Ill., 66. There, under an act of the legislature, it was provided that certain specified corporations (but not all corporations) should pay "weekly" all their employes "the wages earned within six days of the date of payment." This act did not apply to some corporations.

The court discuss the effect of section 9 of the corporation act, and while stating that section 9 of the incorporation act might control all corporations organized under the revised corporation act, yet the court expressly held that said section could not be used or applied unless the obligation sought to be enforced would extend or apply equally to all persons and corporations doing business under similar circumstances. And because such act applied only to *some* persons and corporations, but did not apply to all persons and corporations doing business under similar circumstances, such act was a special law, in violation as well of the provisions of the state constitution, which provide that all general laws should be of a uniform nature, as well also as depriving the injured party of his property "without due process of

law." The court, therefore, held that section 9 of the incorporation act could not be applied under the circumstances of that case.

This case is directly in point, and should control, for section 9 of the incorporation act has no application at bar.

We are not unmindful of the fact that the Danville case is the later utterance of the court, but the Braceville case was not referred to, distinguished or overruled in the Danville case, and such question was not necessary to be decided in the Danville case, and the Danville case is here on review.

If the acts of 1872 are to have the effect given to them by this court, they should be based upon sound principles of law. They do not need the aid or support of a statute that can have no possible connection with the question to be decided, as is section 9 of the incorporation act.

The case of *Beer Co.* v. *Massachusetts*, 97 U. S., 25, cited by the court in support of the opinion, is not a "happy" illustration of the rule to be applied to the construction of section 9 of the incorporation act, because in that case there was a clear distinction between the powers reserved under such statute, since the legislature not only provided that they might, from time to time, make "further provisions and regulations for the management of the corporation and government thereof," but the legislature further reserved the power to "wholly repeal any act or part thereof, establishing a corporation," reservations not found in section 9 of the Illinois corporation act.

Undoubtedly, a corporation originally accepting the provisions of the Massachusetts act would be bound by

any subsequent provisions repealing such act, tending to establish a public policy, and it was by reason of the provisions of the statute reserving the power to repeal and amend that this court rendered the decision in the late case of *Looker* v. *Maynard*, 179 U. S., 46.

Moreover, in the *Beer Company* case, the object sought to be accomplished was in the nature of a police regulation, under the legislative or sovereign powers of the state, and not the regulation of a business attribute of a municipality. The distinction is material.

But if section 9 of the corporation act is not intended to apply to the acts of 1872, 1885 and 1891, then *Beer Company* v. *Massachusetts* is not in point.

But even if in point, the power of repeal cannot deprive plaintiff in error of rights lawfully acquired prior to the passage of the act of 1891. (Arg. 86.)

VI.

Sixth. The court has overlooked the contention made by plaintiff in error, that the act of 1891 relates simply to contracts to be made in the future.

This court further say, in the statutes

"there is no explict provision for repetitions of the power—none declaring the power a continuing one. Who now doubts this? If rights were claimed, and were pleading for a different interpretation, we might have to listen to them, but now, undisturbed by them, we yield to resistance to that meaning which the subject-matter demands, in the absence of negative words."

The logical effect of this holding is this:

The court construes the power *conferred* upon municipal bodies under the act of 1872 by the power *asserted*

in the act of 1891. If the authority conferred under the acts of 1872 was sufficient in itself to authorize the proceedings taken by the city in 1896, the provisions of the act of 1891 are useless, and do not throw any light upon the construction of the provisions of the act of 1872. If the acts of 1872 are not sufficient, in themselves, to authorize the execution of the contract with Shelton, then they are not in anywise affected by the act of 1891. The question for the determination of the court is, whether or not the statute of 1872, by its terms, is a continuing one. If it is not, then the unlawful assertion of that power in 1891 cannot cure the defect in power as to rights already accrued.

In its decision, and in construing the contract, this court, as did the Supreme Court of Illinois in the *Danville* case, fails to properly distinguish between the legislative or governmental powers of the state (or municipality) and the powers exercised while acting in its business or private capacity.

The authorities cited by us clearly show this distinction. (Arg., 54. 58.)

It is true, the court says, in speaking of the contract as interpreted by the state court, "a distinction was made between a contract which related to a governmental function, which the regulation was said to be, and a contract relating to franchises, which, though public in their nature, yet were not governmental, which a supply of water was said to be."

The court here admits that a contract for a "supply of water" is not governmental or legislative, but relates to the business or private capacity of the municipality, and it was on that ground that in the New Orleans cases (115

U. S.), and which have been subsequently followed, this court held that contracts establishing fixed rates for a definite term to be a valid contract.

If the legislature authorized a municipality to make a contract in its business capacity, then such contract is subject to the same rules of construction as were contracts of private individuals. (Arg., 54 *et seq.*)

That a municipal corporation may enter into a contract necessary "to enable it to carry out the powers conferred upon it," we have heretofore shown. (Arg., 47.) The right granted was to make a "contract" and this included all the incidents of a contract. As was said in *Braceville Coal Co.* v. *People*, 147 Ill., at page 75:

"The right to contract necessarily includes the *right to fix the price* at which labor will be performed, and the mode and time of payment. *Each is an essential element of the right to contract.*"

And here consists the difference between the principles as laid down in the Railroad Commission Cases, where all the "people of the state at large" are interested in the public highways and "works for supplying a city with water which are the *private* property of a city"; *a fortiori* the works of individuals supplying a city with water.

So, the case of *Smith* v. *McDowell*, 148 Ill., 51, involved a street in which the public are interested. These cases do not aid in construction.

Counsel for plaintiff in error presented and argued that the power conferred in the act of 1872 was not a continuing one, and urged upon the consideration of the court that the statute of 1891, under well-settled canons of construction, should be construed to relate solely to

such contracts as might thereafter be executed. (Arg., 73.)

This construction the court has overlooked or ignored.

The legislature was well content with the policy authorizing the ordinance establishing fixed rates for a period of thirty years. Most of the ordinances (as at bar) provided that the city might, at the termination of the contract (and in many cases prior thereto) purchase the plant.

It was not until the year 1891 when, by reason of the increased wealth and growing population, the legislature concluded to change the course of public policy as to water plants, by using apt words reserving the right to change the rates by ordinance, "from time to time," as to plants thereafter constructed, instead of having the rates fixed as to the plants thereafter constructed, for the full period of thirty years, or to such parties who may not have contracted for the full period of thirty years.

VII.

Seventh. The court has gone further in its decision than the facts justify.

There is one other point in the opinion which, if correct, goes further than it should in passing upon the contention of plaintiff in error that its property was taken without due process of law.

The court gives, among the reasons for denying the contention of plaintiff in error, that it was deprived of its property without due process of law, in that the act of 1891 did not require giving notice to plaintiff in error of change in the water rates, that this is no longer an

open question in this court, by reason of the decision in *San Diego Land Co.* v. *National City* (174 U. S., 750). That is not a parallel case, and no analogy can be drawn from that case.

It is provided in and by the constitution of California that "the use of all water," etc., "is hereby declared to be a public use, and subject to the regulation and control of the state," the rates to be collected by any water company "*shall be fixed* * * * by the city council, * * * *in the month of February in each year*"; that such ordinances shall be passed "in the manner that other ordinances are passed by such body, and shall continue for one year." In that state water was a matter of *necessity* for the development and maintenance of agriculture. Hence the reason of declaring its use a public use. This constitution was in force when the San Diego Land Company was organized. That the water company took all rights acquired by it subject to these provisions of the constitution there can be no doubt. It was not there questioned that the ordinance was not passed in the *same* "manner that other ordinances are passed." This court, following the decision of the Supreme Court of California, held that, by the terms of the state constitution, water companies were not entitled to notice before fixing the rates in February of each year; as stated by the Supreme Court of California, "the constitution is self-executing, and *it does not require notice.*"

A different question is presented at bar, where the use of water was merely a public *convenience* and where at the time of the execution of the contract there was no constitutional or statutory provision that the legislature might establish rates.

If, as the court say, the wrongs claimed by plaintiff in error on this point is simply an "abstract" and not an actual injury, we should not be foreclosed by a decision clearly not in point.

The court gives the further reason, also, that because the averment in the plea of the defendant in error that the rates as established by the ordinance of 1872 were unreasonable, and the municipality thereafter sought to establish such rate, which, in its opinion, was reasonable, plaintiff's property was not taken without due process of law. The averment in the plea that the rates were unreasonable is entirely immaterial as to the issues before the court. If the municipality was granted the power to make a valid contract, and it did in fact enter into such a contract, then such contract must stand as made, unless set aside by proper proceedings instituted for that specific purpose. (Arg., 75.)

The court, in its opinion, says that the point made by plaintiff in error that municipalities are made judges in their own cases, "seems not to have been presented to the Supreme Court of the state, either in the case at bar or in the cases referred to by it, and upon which it based its opinion."

The point was directly made by Mr. Mann in his argument, when the Danville case was presented in the Illinois Supreme Court, but was passed over in silence by the court.

This same point was presented to the same court below in the case under the 2d, 4th, 7th and 8th errors assigned in that court (Pr. Rec., 28). The court below, in its opinion, say plaintiff in error assigned errors that both the ordinance of 1896 and the act of 1891 were "in violation of sec-

tion 1, article 14, of the amendments to the Federal constitution, as depriving plaintiff in error of property without due process of law." (Pr. Rec., 32.) Although this point was argued below, the court did not then pass upon it, basing its reason for affirming upon the Danville case.

We have endeavored, briefly, to present such points as appear to us not to have received the full consideration of the court.

Respectfully submitted.

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